THE REPUBLICOF UGANDA

IN THE HIGH COURT OF UGANDA AT GULU

CIVIL APPEAL NO. 010 OF 2022

(Arising from Civil Suit No.037 of 2015)

OBOTH ALFONSE ==========APPELLANT

VERSUS

1. **OKECH MARACELLO ========== RESPONDENTS**
2. **OCHAN FILBERT**

BEFORE HON. MR. JUSTICE PHILLIP ODOKI

JUDGEMENT

Introduction:

[1] This appeal arises from the judgment of the Magistrate Grade 1 of Gulu (His Worship Kwizera Vian) dated 9th February 2022 in Civil Suit No. 037 of 2015, wherein he dismissed the Appellant's suit with costs. The Appellant, being dissatisfied with the judgement, appealed to this Court. He prayed that the appeal be allowed; the decision of the trial Magistrate be set aside; he should be declared the owner of the suit land; and that the Respondents be ordered to pay him general damages, the costs of this appeal and the costs of the lower Court.

Background:

[2] The Appellant instituted Civil Suit No 037 of 2015 against the Respondents in the Chief Magistrates Court of Gulu in which he sought for, recovery of customary land situate at Atyang Village, Lujorongole Parish, Lakwana Sub-County, Omoro County (in the present day Omoro District) measuring approximately 100 acres (herein after referred to as 'the suit land'); an eviction

order against the Respondents; an injunction to restrain the Respondents, their agents, workmen and any person acting on their authority from cutting trees from the suit land; general damages; mesne profits; loss of economic use; and costs of the suit. He pleaded that the suit land was acquired by his late grandfather, Abok Obeja. The land was then inherited by his (Appellant's) late father, Kop Hannington, who used the land from 1974 until his demise in 1986. When his father died, he was buried on the suit land. He lived on the suit land together with his family undisturbed until when they left for the IDP camps in 2002. He pleaded that the suit land has graves of, his brother Opira Livingstone who was buried in 1986; his brother Akena David who was buried in 1983; Okech David who was buried in 1978; and Latim George who was buried in 1987. He contended that when he and his family returned from the camps in 2008, they found that the Respondents had trespassed on the suit land. The Respondents stopped him from constructing on the suit land. Thereafter, the 1st Respondent instituted a suit against him in the LCII Court of Lujorongole Parish. The suit was determined in his (Appellant's) favor. The 1st Respondent appealed to the LCIII Court of Lukwana Sub-County. The appeal was also determined in the his (Appellant's) favor. The 1st Respondent further appealed to the Chief Magistrate Court of Gulu. The Chief Magistrate ordered for a retrial. As a result, the 1st Respondent file Civil Suit No. 042 of 2012 before the Chief Magistrates Court of Gulu against him. The suit was dismissed for want of prosecution. The 1st Respondent filed an application to reinstate the suit. The application was also dismissed for want of prosecution. Thereafter, the Respondents resorted to forceful cultivation and cutting down of trees on the suit land thereby depriving him (the Appellant) of his land and subjected him to suffering.

[3] The Respondents filed a joint Written Statement of Defense in which they denied the allegations of the Appellant. They contended that they are the lawful customary owners of the suit land. They pleaded that the 1st Respondent inherited the suit land from his late father, Eronacito Obada who settled on the suit land since time immoral. He was born on the suit land in 1937, grew up on the suit land and resides on the suit land up to the time he filed his WSD. The 2nd Respondent inherited the suit land from his late father, Acire David who also inherited the land from Bartolomeo Obwoya. The late Bartolomeo Obwoya inherited the suit land from Eronacito Obada who also inherited it from Ogwe Aduc who had settled on the land since time immemorial. They pleaded that the Appellant started trespassing on the suit land in 2007 and the 1st Respondent reported the matter to LC1 and LCII Courts which ruled in his favor. Later the Chief Magistrate Court ordered for a retrial. They contended that the Appellant's relatives, Opira Livingstone, Akena David and Latim George were buried on the suit land at home during the insurgency. They contended that the Appellant's customary land is situated in Lanenober Village, Lanenober Parish, Lakwana Sub-County where his father was buried. According to the Respondents, the land of the Appellant and that of the Respondents is separated by Lelecho stream. The Respondents sought for, a declaration that they are the lawful owners of the suit land; a permanent injunction against the Appellant; an eviction order; general damages for trespass; interest; and costs of the suit.

[4] The parties agreed at the scheduling that, the suit land is located in Lujorongole Parish, Lakwana Sub-County, Omoro district; the matter was handled by Local Council Courts; and that the Appelant's relatives were buried on the suit land.

[5] The suit was heard inter parties. The Appellant testified as P.W.1. He called Latigo Kerobino who testified as P.W.2; his cousin brother Oloya Simon testified as P.W.3; and Odong Santo testified as P.W.4. The 1st Respondent testified as D.W.1. The 2nd Respondent testified as D.W.2. The Respondents called Simon Oryang who testified as D.W.3; the son to the 1st Respondent, Kiramas Jackson, who testified as D.W.4; and Akech Venterino who testified as D.W.5.

[6] On the 9th February 2022 the trial Magistrate gave his judgement. His decision was that the suit land belongs to the Respondents. He reasoned that P.W.2 (Latigo Kerobino) was not a truthful witness. He also reasoned that the Appellant's evidence differed from the evidence of his witnesses regarding the size of the suit land. According to trial Magistrate, the inconsistencies were deliberate. The trial Magistrate further pointed out that while at the locus in quo, he was able to see a grass thatched house that belonged to the Respondents near a pit latrine which, in his view was a clear indication that the Respondents have been on the suit land and clearly show how they inherited the suit land from their respective parents. The trial Magistrate stated that the 1st Defendant was able to show Court his former homestead where he lived since 1996. In his view, the Respondents have been in possession of the suit land for a long time and the only time their possession was disturbed was in 2007 by the Appellant. He dismissed the Appellants suit with costs the Respondents.

Grounds of appeal:

[7] The Appellant formulated 4 grounds of appeal.

1. That the Learned Trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record in respect to, agreed facts at scheduling; Defendants' pleadings;

Plaintiff's testimonies; and physical evidence at locus in quo; thereby reaching a wrong conclusion and decision.

2. The Learned Trial Magistrate erred in law and fact when he held that the Respondents are not trespassers on the suit land, thereby arriving at a wrong conclusion/decision.
3. That the Learned Trial Magistrate erred in law and fact when he held that the suit land belongs to the Respondent, thereby reaching a wrong conclusion and/or decision.
4. That the Learned Trial Magistrate erred both in law and fact when he failed to award the Plaintiff general damages even when there were clear/sufficient evidence of destructions and illegal usage of the suit land by the Respondent.

Legal representation and submissions:

[8] At the hearing, the Appellant was represented by Mr. Moses Oyet of M/s M. Oyet & Co. Advocates. The Respondent was represented by Mr. Openy Samuel of M/s Owino, Openy, Nyafono Advocates. The Court gave directives to counsel to file written submission, which directives were duly complied with. I have given the submission of counsel the requisite consideration in this matter.

Analysis and determination of the Court:

[9] Before I proceed to determine the merit of this appeal, I consider it prudent to first determine the point of law which was raised by counsel for the Respondent, in his submissions, that the Appellant's suit was time barred and untenable against the Respondents. Counsel relied on the testimony of Appellant, at the locus in quo, that the Respondent built his hut on the suit land in 1996, as the basis of his submission that the suit is barred by time limitation. According to counsel

for the Respondent, the Appellant's suit was for recovery of land. The suit was filed on 15th June 2015, out of time and yet the Appellant did not plead any disabilities. In support of his submission, counsel relied on Section 5 of the ***Limitation Act, Cap 80***; Order 7 Rule 6 of the ***Civil Procedure Rules SI 71-1***; the case of ***Ababiri Mohamood & 4 Ors versus Mukomba Anastansia & Anor HCCS No. 22 of 2015***; ***Odyeji & Anor Versus Yokonani & 4 others HCCA No. 009 of 2017***; and ***FX. Miramago Versus Attorney General [1979] HCB, 24.*** Counsel for the Appellant did not make any submissions in reply the point of law raised by counsel for the Respondent.

[10] Order 7 rule 11(d) of the ***Civil Procedure Rules S.I.71 -1*** provides that a plaint shall be rejected where the suit appears from the statement in the plaint to be barred by the law. Section 5 of the ***Limitation Act, Cap 80*** provides:

> *"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person."*

[11] In the instant case, the Appellant stated in the plaint that his claim was for, inter alia, recovery of customary land. Nowhere in the plaint did the Appellant state the year when he was dispossessed of proprietary title of the suit land. What he pleaded, in Paragraph 4(d) of the plaint, was that when he returned to the suit land with his family in 2008, they found that the Respondents had trespassed upon the suit land. From the reading of the plaint, it cannot therefore be concluded that the suit is barred by limitation. In his testimony in court, the Appellant stated that the Respondents started entering the suit land in 2008 by cultivating the suit land and building thereon a grass thatched house. From that evidence, it shows that the cause of action against the Respondents arose in 2008.

The suit was filed in the Chief Magistrates Court in 2015, which was 6 years after the cause of action accrued.

[12] Regarding the testimony of the Appellant at the locus in quo that the Respondents built a hut on the suit land in 1996. In my view, this was new testimony which was contrary to what the Appellant testified in Court. It is trite law that evidence at the locus in quo cannot be substituted for evidence already given in court. See: ***Kwebiiha Emmanuel and another versus Rwanga Furujensio High Court Civil Appeal No. 21 of 2011***. The new evidence of the Appellant at the locus in quo that the Respondents built a hut on the suit land in 1996 cannot be substituted for the evidence which the Appellant gave in Court that the Respondents built the grass thatched house on the suit land in 2008. I therefore find that the Appellant's suit was not barred by time limitation.

[13] I shall now proceed to determine the merits of this appeal. Before I do so, I wish to point out that the duty of this Court, as a first appellate Court, is to reconsider all material evidence that was before the trial court and to come to its own conclusion on the evidence. This settled position of the law was stated by the Supreme Court in ***Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000***. At page 7, Mulenga J.S.C stated that:

> *"It is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusion on the evidence. In so doing, the first appellate court must consider the evidence on any issue in its totality and not any piece thereof in isolation. It is only through such re – evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court."*

Ground 1: That the Learned Trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record in respect to, agreed facts at scheduling; Defendants' pleadings; Plaintiff's testimonies; and physical evidence at locus in quo; thereby reaching a wrong conclusion and decision.

Ground 3: That the Learned Trial Magistrate erred in law and fact when he held that the suit land belongs to the Respondent, thereby reaching a wrong conclusion and/or decision.

[14] I have decided to deal with ground 1 and 3 together since they both deal with evaluation of evidence regarding ownership of the suit land. I note that although the trial Magistrate visited the locus in quo, he did not draw any sketch map of the locus in quo. This matter being a boundary dispute, it was necessary for the trial magistrate to draw a sketch map of the locus in quo clearly showing the area under dispute, to record evidence at the locus in quo regarding the area under dispute and to establish whether it confirms or contradicts the evidence which was given in court. Drawing a map of the area under dispute not only assist in evaluating the evidence but also make enforcement of the court decision easy especially when the matter is a boundary dispute of unregistered land. The area under dispute has to be clearly earmarked on the sketch map of the locus in quo to enable any person who may be entrusted with enforcement of a court order not to include other areas which was not the subject of litigation.

[15] Be that as it may, the Appellant (P.W.1), in his testimony in Court, described the boundaries of the entire suit land. He stated that from the northern side there is an anthill which separates the suit land with the land of Oryang Obedia. According to him, the land of Oryang Obedia is now being occupied by the 1st Respondent. On the northwestern side there is a hill which separates the suit land and the land of Obwoya Batolomayo (nephew of the 1st Respondent and grandfather of

the 2nd Respondent). On the southern side there are gardens which separates the suit land with the land of Okeny Peter. On the eastern side, there is a banana plantation which was planted by his late brother Akena David in 1976 on the land of Oryang Binayo. On the western side there is Lanenober road which separates the suit land with the land of Latigo Kerobino Arop. He denied that Lelacho stream is the boundary between the suit land and the land of the 1st Respondent. When Court visited locus in quo, the Appellant showed to the Court the boundaries of the suit land which was the same with his testimony in court. He further testified that the land across Lelacho stream also forms part of the suit land which belongs to him and that is where his home is. P.W.2 (Latigo Kerobino) testified that he is aware of the boundary between the Appellant and the Respondents. He came to know the boundary when he used to dig with Kop's children. He would see where they would stop. He testified that he is not aware that the boundary between the Appellant and the Respondents is Lalecho stream. P.W.3 (Oloya Simon Abok) described the neighbors to the suit land to be, the first Respondent on the Northern side; himself (P.W.3) on the Southern side; Oryang Benoni on the Eastern side; and Kerobino Arap on the Western side. P.W.4 (Odong Santo), testified that part of the suit land is in Paidong and another part is in Palenga. Accrding to him, the suit land measures about 100 acres and it is located in two villages. It stretches from lalecho stream up to where there is a rock. He described the neighbors of the suit land as, the 1st Respondent on the northern side; Okeny on the Southern side; Oryang Binayo on the Eastern side; and Kerobino Latigo on the Western side. He testified that there is a footpath between the suit land and the land of the 2nd Respondent.

[16] The 1st Respondent (D.W.I) on the other hand testified that the suit land is situated at Atyang village, Lujorongole parish in Lakwana, measuring approximately 50 acres. He stated that the disputed land is between Paidango and Palenga. He mentioned the neighbors to the suit land as

being, Obwoya Bartholomay on the northern side; the Appellant's land on the southern side; Benayo Oryang on the Eastern side; and his home is on the western side. He testified that there is Lelacho stream and a rock which separates his land with the Appellant's land. He testified that there is a feeder road which goes to the home of Bartholomay but he denied that it is a boundary. In reexamination he testified that there is a road that separates his land from that of the Appellant. The 2nd Respondent (D.W.2) testified that the suit land is situated at Atyang village, Lujorongole parish, Lakwana Sub-county, Omoro District, measuring approximately 50-60 acres. He mentioned the neighbors to the suit land to be, Michael Olango on the Northern side; Lelaco stream on the Southern side; the 1st Respondent on the Eastern side; and Kerobino Akop on the Western side. According to him, Lalecho stream separates his land from that of the Appellant. He denied knowledge of any feeder road. D.W.3 (Simon Oryang), a son to the 1st Respondent, testified that the suit land is at Atyang village and he does not know its size. He mentioned the neighbors of the suit land as, Alaro on Eastern side, the children of the 1st Respondent on Northern side, the children of 1st Respondent and the 2nd Respondent on the Western side and a stream in the Southern side. Beyond the stream is Alfred Oryang. He testified that the Appellant is on the southern side of the suit land. D.W.4 (Kiramas Jackson), a son to the 1st Respondent and a cousin brother to the 2nd Respondent, testified that the suit land is only in Atyang village and it is owned by the Respondents. According to him, the Appellant is a neighbor to the suit land. Lelacho stream is the boundary that separates the suit land and the land of the Appellant. D.W.5 testified that the suit land is situated in Atyang Village, Lujorongole Parish. He described the boundaries of the suit land. On the northern side is the land of Olal Micheal. On the eastern side is the land of Binayo. On the western side is the land of Latigo Galdino. On the southern side is Lalecho stream.

[17] From the above evidence, it is evident that the boundaries of the suit land which was described by the Appellant and his witnesses includes the entire land which the Appellant contends belongs to him, inclusive of the portion which is in dispute. It is also evident that the boundaries of the suit land which was described by the Respondents and their witnesses includes the entire land which the Respondents contend belongs to them, inclusive of the portion which is in dispute. From the evidence of the witnesses, it is very clear that the portion under dispute is located in Atyang village, North of lalecho stream and south of the anthill/ hill/rock. According to P.W.4 (Odong Santo) the land stretches from lalecho stream up to the rock. The Appellant testified that it is the anthill/ hill which is the common boundary between him and the Respondents. The Respondents, on the other hand, testified that their boundary with the Appellant is Lalecho stream. Therefore, for all intends and purposes, the suit land is the portion under dispute and not the entire land which the parties claimed ownership of.

[18] Related to the issue of the exact location of the suit land is the issue regarding the size of the suit land. Counsel for the Respondent submitted that the Appellant departed from his pleadings that the suit land is 100 acres by adducing evidence that the suit land is only 16 acres. Counsel also submitted that the Appellants witnesses contradicted themselves regarding the size of the suit land.

[19] It is a settled position of the law that a party is bound by their pleadings and is supposed to only adduce evidence at the trial to prove the case set out by them in their pleadings. This settled position of law was well articulated by the Supreme Court in ***Interfreight Forwarders (U) Limited versus East African Development Bank (1990 – 1994) EA 117.*** At page 125, Oder J.S.C stated that:

"The system of pleadings is necessary in litigation. It operates to define and deliver it with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the double purposes of informing each party what is the case of the opposite party which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial. See Bullen & Leake and Jacob's Precedents of pleading 12th Edition, page 3. Thus, issues are formed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof of the case so set and covered by the issues framed therein. A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not so set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings."

[20] I have examined the evidence of the Appellant and his witnesses as against his pleaded case. At paragraph 3 of the plaint, the Appellant pleaded that the suit land measures approximately 100 acres. He testified that the suit land measures about 100/130 acres. It is situated in Atyang village, but it extends to Lanenober village. He further testified that the portion of the suit land which is in dispute is situated at Atyang village measuring approximately 16 acres. P.W.2 (Latigo Kerobino) estimated the suit land be 100 acres. According to him the Appellant cultivates about 16 acres of the suit land. P.W.3 (Oloya Simon Abok) testified that the suit land is partly in Lujorongole and partly in Lanenober. It measures approximately 100 acres. The dispute is on 80 acres. P.W.4 (Odong Santo), testified that the suit land is about 100 acres and it is located in two villages.

[21] In my view, the Plaintiff did not depart from his pleaded case. He testified that the suit land is approximately 100 acres. However, the portion which is under dispute is about 16 acres. I am alive to the fact that the witnesses were estimating the size of the suit land and the size of the portion in dispute. I therefore find that trial Magistrate erred in fact when he found that the Appellant's evidence differed from the evidence of his witnesses regarding the size of the suit land.

[22] Regarding the ownership of the suit land, both the Appellant and the Respondents pleaded that they are the customary owners of the suit land. The law is settled that a person relying on any customary ownership of land has the onus to prove the custom, unless the court takes judicial notice of the custom under Section 55 of the ***Evidence Act, Cap 6*** in which case there would be no need to be proved the custom. In ***Atunya Valiryano versus Okeny Delphino High Court Civil Appeal No. 0051 of*** 2017 my brother Judge Mubiru J. held that:

> *"…a person seeking to establish customary ownership of land has the onus of proving that he or she belongs to a specific description or class of persons to whom customary rules limited in their operation, regulating ownership, use, management and occupation of land, apply in respect of a specific area of land or that he or she is a person who acquired a part of that specific land to which such rules apply and that he or she acquired the land in accordance with those rules. The onus of proving customary ownership begins with establishing the nature and scope of the applicable customary rules and their binding and authoritative character and thereafter evidence of acquisition in accordance with those rules, of a part of that specific land to which such rules apply."*

[23] Where the customary law is not well known nor documented the opinion of experts on the custom is a relevant fact in establishing the existence of a custom or customary law. See Section Section 46 of the ***Evidence Act, Cap 6.*** In ***Kampala District Land Board and another versus Venansio Babweyaka and 4 others SCCA No. 2 of 2007*** Odoki C.J held that:

> *"It is well established that where African customary law is neither well known nor documented, it must be established for the Court's guidance by the party intending to rely on it. It is also trite law that as a matter of practice and convenience in civil cases relevant customary law if it is incapable of being judicially noticed, should be proved by evidence of expert opinion adduced by the parties. In* ***Ernest Kinyanjui Kimani v. Muira Gikanga*** *[1965] E.A. 735, Duffus J.A. sai at page 789:*
>
> > *"As a matter of necessity, customary law must be accurately and definitely established. The Court has the wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in my view, especially, of the present apparent lack in Kenya of authoritative text books on the subject or of any relevant case law, this would in practice, usually mean that the party propounding the customary law would have to call evidence to prove the customary law as he would prove relevant facts of his case."*

[24] Proof of mere occupancy and user of unregistered land, however long that occupancy and user may be, without more, is not proof of customary tenure. That occupancy should be proved to have been in accordance with a customary rule accepted as binding and authoritative. See:

Bwetegeine Kiiza and Another versus Kadooba Kiiza C.A. Civil Appeal No. 59 of 2009; ***Lwanga v. Kabagambe, C.A. Civil Application No. 125 of 2009***; *and* ***Musisi v. Edco and Another, H.C. Civil Appeal No. 52 of 2010***.

[25] In the instant case, the Appellant (P.W.1) testified that the suit land belongs to his late father Hannington Kop who inherited it from his father, the late Abok Obeja. P.W.2 (Latigo Kerobino) testified that the suit land belonged to the father of the Appellant, the late Hannington Kop, though he is not aware of how he acquired it. P.W.3 (Oloya Simon Abok) testified that the suit land previously belonged to the Appellant's grandfather. The Appellnat's father, Hannington Kop, acquired the land from his father called Abok. He testified that the Appellant inherited the suit land from his late father Hannington Kop who died in in 1986. P.W.4 (Odong Santo), testified that Hannington Kop used to cultivate the suit land but he died before people went to IDP camp and he was buried on the suit land on the side in Palenga. According to him, the suit land belongs to the Appellant who inherited it from his father, the late Hannington Kop and he currently cultivates about 20 acres of it.

[26] The 1st Respondent (D.W.I), on the other hand, testified that he inherited the suit land from his father Erinasito Obeda who also inherited it from Ogwe Aduc. He was born on the suit land and he cultivates it. The 2nd Respondent (D.W.2) testified that he acquired the suit land from his father Acire David who died in 2001 and was buried at Atyang on the suit land. Acire David also inherited the suit land from Bartolomeo Ovuya. His mother Ventorina Akech and his brothers Odong Patrick, Olanya Jacob and Ojok Alex stay on the suit land. He testified that he stays on the suit land together with his mother and his brothers Odong Patrick, Olanya Jacob and Ojok Alex. D.W.3 (Simon Oryang), a son to the 1st Respondent, testified that the suit land belongs to both

Respondents because it was for their grandfather who was buried on the suit land. According to him, the 1st Respondent inherited the suit land from his late father Erinansio Obali. He further testified that the Respondents were born on the suit land, they have houses and gardens on the suit land. Their relatives also settled on the suit land and planted trees. DW5 (Akech Venterina) testified that the suit land was owned by Ogwee Atum but he does not know how he acquired it. He explained that the 1st Respondent is the grandchild of Ogwee Atum, while the 2nd Respondent was a son of the late David Acire. He is the grandson of Obwoya who is the son of Elinersito Ogal.

[27] It is clear from the above evidence that neither the Appellant nor the Respondents adduced any evidence to prove customary ownership of the suit land. They did not prove that the they belong to any class of persons under which they acquired the suit land. They neither proved any customary law applicable to any specific class of persons nor did they prove that any such customary laws are authoritative and binding and that they fulfilled all the requirements of rules applicable when acquiring the suit land. The only evidence adduced was in regard to possession which is no proof of customary tenure.

[28] Be that as it may, possession confers possessory title upon a holder of land, good and enforceable against any other persons who cannot show a better title. In ***Boiti Bonny versus Imalingat Lawrence Court of Appeal Civil Appeal No. 239 of 2016 Gashirabaki*** J.A, held that:

> *"Possession confers a possessory title upon a holder of land and a recognizable enforceable right to exclude all others but persons with a better title. Possession of land is itself a good title against anyone who cannot show a prior and therefore better right to possession (see Asher v.Whitlock(1865) LR 1 QB1)."*

[29] Similarly in ***Atunya Valiryano*** (supra), my brother Judge Mubiru J. held that:

> *"At common law, factual possession of land signifies an appropriate degree of exclusive physical control. For vast lands, possession requires knowledge of its boundaries and the ability to exercise control over them (see Powell v. McFarlane (1977) 38 P&CR 452). In respect of claims over adjacent unoccupied land, there should be evidence that the claimant deals with the cleared and un-cleared portions of the land, co-extensive with the boundaries, in the same way that a rightful owner would deal with it Once there is evidence of open, notorious, continuous, exclusive possession or occupation of any part thereof as would constructively apply to all of it, in such cases occupancy of a part may be construed as possession of the entire land where there is no actual adverse possession of the parts not actually occupied by the claimant. A person exercising such possession therefore, for all practical purposes, is the "owner" of the land since it is trite that* ***"possession is good against all the world except the person who can show a good title" (see Asher v. Whitlock (1865) LR 1 QB 1, per Cockburn CJ at 5)."***

[30] The Appellant partly relied on the evidence of burial of his relatives on the suit land to prove that his family was in possession and occupation of the suit land for a long time. Although D.W.3 (Simon Oryang) testified that none of the Appellants' relatives were buried on the suit land, I have found that evidence not useful, given the fact that it was an agreed fact at the scheduling that the Appellants relatives were buried on the suit land. The Respondent and their witnesses did not adduce any evidence which could explain why the relatives of the Appellant were buried on the suit land if indeed they were not the one in possession and use of the suit land.

[31] In addition, the Appellant (P.W.1) testified that the suit land has the graves of his brother Akena David, Oketch who was buried in 1978 and Opira Livingstone was buried on the suit land in 1986. He testified that the suit land also has the grave of his father Hannington Kop who was buried in 1986 and Latim George who was buried in 1987.When the court visited the locus in quo, the Appellant showed to the Court the grave of Akena David who was buried in 1983 and broken pots used on the graves as per the Acholi Culture. P.W.3 (Oloya Simon Abok) testified that the father of the Appellant, Opira, Akena and all the Appellants' brothers we buried on the suit land. P.W.4 (Odong Santo), testified that the father of the Appellant (Hannington Kop) died before people went to IDP camp and he was buried on the suit land on the side in Palenga.

[32] The Respondents having agreed that the Appellants relatives were buried on the suit land, I have no reason to doubt the evidence of the Appellant, P.W.3 and P.W.4 that the relatives of the Appellant were buried on the suit land in the years mentioned above. In any case, the 1st Respondent (D.W.I) testified that he did not know where the father of the Appellant was buried. The 2nd Respondent (D.W.2) testified that he is not aware that the Appellant's brother Akena David was buried on the suit land. D.W.5 testified that he has no knowledge that Akena David was buried on the suit land. Their lack of knowledge of where the father of the Appellant and Akena David were buried, does not in any way mean that theywere not buried on the suit land.

[33] Although D.W.3 (Simon Oryang) testified that the father of the Appellant was buried in Lanenober, he did not give any details of where in Lanenober he was buried so as to controvert the evidence of the Appellant's witnesses that he was buried on the suit land. I have therefore found his evidence not believable.

[34] D.W.3 (Simon Oryang) also testified that the grandfather of the Respondents was buried on the suit land. He did not confirm, at the locus, where he was buried. His evidence regarding the burial of the grandfather of the Respondent is not believable given that the other witnesses of the Respondents testified that all the relatives of the Respondents were not buried on the suit land. The 2nd Respondent (D.W.2) testified that both parents of the 2nd Respondent died and were buried in their homes which is 100 meters away from where 2nd Respondent is. He further testified that the father of the 1st Respondent, the late Erinasio Obali and his mother the late Alite Lagony were not buried on the suit land, but were buried on their land which is about 150 meters away from the suit land and that is where their homestead is situated. D.W.4 (Kiramas Jackson) testified that the late Obwoya Batrimayo, the grandfather of the 2nd Respondent, was buried at the home of his son Michael Olango which is about 300 to 400m away from the suit land. DW5 (Akech Venterina) testified that the 2nd Respondent's father, the late David Acire, was not buried on the suit land. He further testified that the 1st Respondent's father, the late Ogal Elinesia, never settled on the suit land therefore he was not buried on the suit land but at his son's home.

[35] In my view, the evidence by the witnesses of the Respondents regarding the burial of the Respondents relatives outside the suit land gives credence to the evidence adduced by the Appellant and his witnesses that it is the Appellants relatives who were in possession and use of the suit land as far back as the 1970s until 2008 when the Respondents trespassed on the suit land.

[36] In further proof that he was in possession and use of the suit land before the Respondents trespassed on it in 2008, the Appellant (P.W.1) testified that in 1979 he built a house on the suit

land. He only left the suit land in 1986 because of insurgency. He returned to the suit land in 1994 and fled again in 2002. He mentioned the features on the suit land to include his old homestead and the old homesteads for his mother, the homestead of Opira Livingstone, that of Akena David and that of Latim George. The other features which he mentioned were 5 Mivule trees that were planted by his grandfather. He testified that the trees were cut but they keep growing back.

[37] When Court visited locus in quo, the Appellant showed to the Court the 4 Muvule trees which he said were planted in the 1970s. He testified that some of the trees were cut by the 2nd Respondent to burn charcoal but they were re - growing. He also showed to the Court logs of muvule tree; a place where charcoal was burnt; a raised ground indicting former homestead which he said belonged to his late father Hannington; a house which he said was built by his brother Akena David in 1978, a hole which was 30 meters away from the hut which he said they used to get mud from; another hole from where Akena David used to get mud from; Keno (Source of fire) for David Akena; his garden of maize and soya beans; bricks which he said he made around 2014; and a hut which he said was built by the Respondents in 1996.

[38] Counsel for the Respondents submitted that the Appellant introduced new evidence when at the locus in quo he showed Court the fire source for David Akena, a pit and broken pots that were used on the grave of David Akena. I do not agree with the submission of counsel. The evidence which Appellant showed the Court was proof of the existence of an old homestead that belonged to his brother the late David Akena and his grave which the Appellant which he had testified in Court that they exist on suit land.

[39] The evidence of the Appellant regarding early occupation and use of the suit land was corroborated by the evidence of P.W.2 (Latigo Kerobino) who testified that when he came to the area in 1980, he found when the Appellant was already cultivating on the suit land. The evidence of the Appellant was further corroborated by the evidence of P.W.3 (Oloya Simon Abok) who testified that he knew about the suit land since 1980 when he was studying and used to see the Appellant staying on the suit land where the Respondents have now trespassed on. According to him, the Appellant had about 5 houses and lived on the suit land until 1986 when he settled with his family at Lakwatomer along the road. He testified that the Appellant cultivated the suit land, planted Tangerine and bananas on the suit land. P.W.4 (Odong Santo), testified that the father of the Appellant used to cultivate the suit land but he died before people went to IDP camp. He mentioned the features on the land which include, Malena tree in the old homestead and other trees. According to D.W.4 (Kiramas Jackson) the land where the Respondents stay is where their grandfather stayed. The land is different from the suit land and it is 1Km away. According to him, the 1st Respondent used to cultivate from his home up to the rocks and there is no dispute over that area. The 2nd Defendant also used to cultivate up to the rocks.

[40] The 1st Respondent (D.W.I), on the other hand, testified that he was born on the suit land. He testified that the suit land has muvule trees and bamboo trees which he planted. It also has gardens and a house of his children. He stated that he uses the suit land together with his children, his brother Oryang Batolomayo Obwoya and children of Oryema. According to him, the father of the Appellant, never stayed or had a homestead on the suit land. His home is at Lanenober parish. He further testified that the Appellant has no house on the suit land. According to him, it was in 1986, during the insurgency, that the Appellant trespassed on the suit land by making bricks.

[41] The 2nd Respondent (D.W.2) testified that he stays on the suit land together with his mother and his brothers Odong Patrick, Olanya Jacob and Ojok Alex. He mentioned the features on the suit land to include, buildings belonging to him, his brothers and grandfather, but the house constructed by his father no longer exists. The land also has a Banana plantation which was planted by David Acire, Paw paws, and other food stuffs such as Simsim, G.nuts, Beans, Peas which they grow. According to him, the Appellant has land at Lanenober village, Lakwana sub-county in Omoro District but he started claiming the suit land in 2007 and laid bricks thereon. In 2015 the Appellant started cultivating the suit land, cut down trees and burnt them for charcoal and he is using approximately 3 acres of the land. He testified that the Appellant does not have a house on the suit land. When the court visited the locus in quo, the 2nd Respondent showed to the Court, a pit latrine which he said was for his father Acire David; remains of a hut which he said belonged to his mother Vetorina which was burnt in 1997; Lelacho stream and the Appellant's residence which goes up to the stream.

[42] D.W.3 (Simon Oryang) testified that that the Respondents were born on the suit land. They have houses, gardens and their relatives settled in the suit land. They also planted trees. According to him, the Appellant was born in Lanenober village in Lanenober parish. His father, Hannington Kop, never left a homestead on the suit land. He stated that the Appellant was born from Lanenober village. D.W.4 (Kiramas Jackson) testified that the Respondents were born and raise on the suit land. He testified that he knows the late Obwoya Bartholomay the grandfather of the 2nd Respondent, his home was on the suit land and its traces are visible. D.W.5 (Akech Venterina)

testified that the suit land has Banana plants which were planted by himself, jack fruits which were planted by Jackson Kilama a Son to the 2nd Respondent, homes of the 2nd Respondent.

[43] I have examined the above evidence of the Appellant and that of the Respondent. Although the Respondents and their witnesses all testified that the Respondents were born on the suit land, no evidence was adduced in court to prove that they were indeed born from the suit land. The Respondents did not adduce any evidence as to when the houses which they alleged they built on the suit land were actually built. The Respondents did not also adduce evidence in Court as to when they planted the crops and trees on the suit land.

[44] Although at the locus in quo, the 2nd Respondent showed to the Court, a pit latrine which he said was for his father Acire David and remains of a hut which he said belonged to his mother Vetorina which was burnt in 1997, no evidence was led to prove when the pit latrine was constructed on the suit land and when the alleged hut was constructed on the suit land. The Appellant on the other hand testified that he built a house on the suit land in 1979. His evidence was corroborated by the evidence of P.W.2, P.W.3 and P.W.4.

[45] I have found the evidence of the Respondents that the Appellant and his father never stayed or had a homestead on the suit land but their home is at Lanenober parish not believable. Whereas the Appellant testified that he stays in Lanenober village, at the locus in quo, he was able to show to the Court proof that he occupied the suit land together with his family as early as 1976. The evidence of the 1st Respondent (D.W.I) that it was in 1986, during the insurgency, that the Appellant trespassed on the suit land by making bricks was sharply contradicted by the evidence

of the 2nd Respondent (D.W.2) who testified that it was in 2007 when the Appellant started claiming the suit land and laid bricks thereon. This was a major contradiction which shows that the Respondents were not telling the court the truth.

[46] In the circumstances, I find that the evidence of the Appellant and his witnesses proved on a balance of probabilities that the Appellant and his predecessors (his late father and grandfather) have been in continuous, exclusive possession or occupation and use of the suit land undisturbed by since the 1970s until when the Respondent trespassed in the suit land in 2008. The Appellant thus has possessory title over the suit land.

[47] I do not agree with the finding of the trial Magistrate that the 1st Refendant was able to show Court his former homestead where he lived since 1996. The record of proceedings does not show that the 1st Respondent showed the Court his homestead where he lived since 1996. The 1st Respondent testified did not testify when the Court visited locus in quo. Secondly, even though there was evidence that the 1st Respondent lived on the suit land since 1996, there is clear evidence that the Appellant and his predecessors lived and used the suit land from the 1970s before the Respondents went to the land. I therefore find that the trial Magistrate failed or neglected to properly evaluate the evidence on the Court record which clearly shows that the Appellant, his grandfather the late Abok Obeja and his late father Hannington Kop were in possession and use of the suit land much before the Respondents came and trespassed. In so doing, he reached to a wrong conclusion that the suit land belongs to the Respondent. Ground 1 and 3 of the appeal therefore succeed.

Ground 2: *The Learned Trial Magistrate erred in law and fact when he held that the Respondents are not trespassers on the suit land thereby arriving at a wrong conclusion/decision.*

[48] The law on trespass to land is fairly settled. In ***Justine E.M.N Lutaya vs Sterling Civil Engineering Company Ltd Civil Appeal No. 11 of 2002*****,** at page 6, Mulenga, J.S.C held that;

> *"Trespass to land occurs when a person makes an unauthorized entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land."*

[49] In ***Sheikh Muhammed Lubowa versus Kitara Enterprises Ltd CACA No. 4 of 1987***, Manyindo V-P held that;

> *"…it seems clear to me that in order to prove the alleged trespass, it was incumbent on the Appellant to prove that the disputed land indeed belonged to him, that the Respondent had entered upon that land and that that entry was unlawful in that it was made without his permission or that the Respondent had no claim or right or interest in the land."*

[50] Trespass to land occurs in many ways. According to ***Winfield and Jolowicz on Tort 14th Edition*** at page 387:

> *"Interference with the possession of land sufficient to amount to trespass may occur in many ways. The most obvious example is the unauthorized walking upon it or going into the building upon it, but it is equally trespass if I throw things on your land or allow my cattle to stray on to it from my land, and even if I do no more than place my ladder against your wall. And if you have given me permission to enter your land after it has expired,*

then, again, I am a trespasser. The one restriction is that for trespass the injury must be direct and immediate. If it is indirect or consequential, there may well be a remedy (usually for nuisance or for negligence), but whatever it is it will not be trespass. If I plant a tree on your land, that is trespass. But if the roots or branches of the tree on my land projects into or over your land, that is a nuisance"

[51] Counsel for the Appellant submitted, and I agree with him, that in the instant case, the Respondents are cultivating the suit land and have been doing so for more than 10 years, without the permission of the Appellant, thereby interfering with the Appellant's lawful possession of that suit land. The Respondents have cut down the four stems of muvule trees planted by the Appellant's late father Hannington Kop and this was confirmed by the Court when it visited locus in quo. The Appellant showed to the Court the muvule trees which he said were cut by the 2nd Respondent to burn charcoal; logs of muvule tree; a place where charcoal was burnt. The Respondents admit that they are cultivating the suit land together with their relatives. D.W.1 testified that he stopped the Appellant from making bricks on the suit land. I therefore find that the Respondents trespassed on the suit land.

Ground 4: *That the Learned Trial Magistrate erred both in law and fact when he failed to award the plaintiff general damages of even when there are clear/sufficient evidence of destructions and illegal usage of the suit land by the Respondent.*

[52] According to ***Halsbury's Laws of England, 4th Edition reissue Volume 12(1) paragraph 812***, general damages are defined as:

"... those losses, usually but not exclusively non pecuniary, which are not capable of precise quantification in monetary terms. They are those damages which will be presumed

to be natural or probable consequence of the wrong complained of; with the result that the Plaintiff is only required to assert that damage has been suffered."

[53] The principles governing measurement of damages in cases of breach of contract and tort is that there should be *restitutio in integrum*. In ***Simon Mbalire vs. Moses Mukiibi High Court Civil Suit No. 85 of 1995*** Tinyinondi J. held that:

"*The fundamental principle by which courts are guided in awarding damages is restitution integram. By this principle is meant that the law will endeavor so far as money can do it, to place the injured person in the same situation as if the contract had been performed or in the position he occupied before the occurrence of the tort both in case arising in contract and in tort, only such damages are recoverable as arises naturally and directly from the act complained of".*

[54] The Appellant (P.W.1) testified that the Respondents started entering the suit land in 2008. They are cultivating the suit land and built a grass thatched house on it. When the court visited the locus in quo, the Appellant showed to the Court the muvule trees which he said were cut by the 2nd Respondent. The Respondents admit that they are cultivating the suit land together with their relatives. P.W.2 (Latigo Kerobino) testified that the Respondents encroached on the suit land and are cultivating it from inside, in the middle, yet before the insurgency they were not using it. P.W.3 (Oloya Simon Abok) testified that the Respondents encroached on approximately 40 acres of the suit land, were they built three houses and are cultivating it. In the circumstances, I consider an award of general damages of UGX 30,000,000 appropriate for the loss and inconvenience which was suffered as the result of the Respondents trespass on the suit land.

[55] In the end, this appeal succeeds and the following orders are hereby made;

1. The suit land is declared to belong to the Appellant, having possessory title over it.
2. The Respondents are declared to be trespassers on the suit land.
3. The Respondents are hereby ordered to give vacant possession of the suit land to the Appellant, failure of which, they should be evicted from the suit land.
4. A permanent injunction is hereby given to restrain the Respondents and their agents or any person deriving authority from laying any claim or trespassing onto the suit land.
5. The Respondents to jointly and severally to pay to the Appellant general damages of UGX. 30,000,000/= (Uganda Shillings Thirty Million Shillings).
6. The Respondents to bear the costs of this appeal and the costs in the lower Court.

I so order.

Dated and delivered by email this 29th day of May,2024

Phillip Odoki

Judge.